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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ARMANDO MORALES, Petitioner, **v.** **DARREL ADAMS, Warden,** Respondent.	08cv0705 JAH (PCL) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS**

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STATEMENT OF THE CASE

On March 12, 2004, a jury found Morales guilty in Imperial County Superior Court case number CF12094 of assault by a prisoner by means of force likely to produce great bodily injury (Cal. Penal Code § 4501) and assault on a peace officer by means likely to produce great bodily injury (Cal. Penal Code § 245(c)). The jury also found true allegations that Morales personally inflicted great bodily injury (Cal. Penal Code § 12022.7(a)). (Lodgment 1 at 142.) The trial court found true allegations that Morales had three prior convictions under the Three Strikes law (Cal. Penal Code §§ 667(b)-(i), 1170.12(a)-(d)). (Lodgment 1 at 82, 143.) On May 12, 2004, Morales

was sentenced to two concurrent terms of 28 years to life in state prison. (Lodgment 2 at 8-10.)

Morales appealed to the California Court of Appeal, Fourth Appellate District, Division One in case number D044560. (Lodgment 4; Lodgment 5.) On June 13, 2005, the Court of Appeal ordered the concurrent sentence on count two (assault on a peace officer) stayed pursuant to California Penal Code section 654, but otherwise affirmed the judgment. (Lodgment 6.)

Morales filed a petition for review in the California Supreme Court in case number S135813.[1/] On August 31, 2005, the California Supreme Court denied review. (Lodgment 7.)

On October 17, 2006, Morales filed a petition for writ of habeas corpus in the Imperial County Superior Court in case number EHC 00801.[2/] On December 15, 2006, the superior court denied the petition on the merits. (Lodgment 8.)

On February 20, 2007, Morales filed a petition for writ of habeas corpus in the Court of Appeal in case number D050319.[3/] (Lodgment 9.) On July 27, 2007, the Court of Appeal denied the petition as untimely and lacking in merit. (Lodgment 10.)

On August 27, 2007, Morales filed a petition for writ of habeas corpus in the California Supreme Court in case number S155801. (Lodgment 11.) On March 12, 2008, the California Supreme Court denied the petition without citation or comment. (Lodgment 12.)

On April 16, 2008, Morales filed the instant federal Petition.[4/] On May 14, 2008, this Court ordered a response to the Petition.

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1. Respondent has not yet obtained a copy of the petition for review.

2. Respondent has not yet obtained a copy of this petition.

3. Morales signed the proof of service attached to this petition on February 7, 2007. (Lodgment 11 at 18.)

4. Morales's Petition indicates that it was mailed on April 9, 2008. (Pet. at 21.)

STATEMENT OF FACTS[5/]

On February 23, 2002, Rhoads was working as a correctional officer at a prison in which Morales was an inmate. At about 6:00 p .m., Morales did not comply with an order to return to his cell. Rhoads and Correctional Officer Romero contacted Morales, handcuffed him, and took Morales to a nearby sally port to "counsel" Morales about the need to comply with orders. As Rhoads chastised Morales for his childish behavior, Morales "blew up," began using abusive language, and described himself as dirt. Morales was then escorted to his cell.

Approximately two hours later, Rhoads was at a podium overseeing "upper-tier" inmates returning from the exercise yard to their cells, and was also conducting a signup for "lower-tier inmates" to schedule their telephone privileges for the following day. Morales (an "upper-tier" inmate) did not return to his cell as required, but instead joined the line of "lower tier" inmates waiting to register for telephone privileges. When Officer Romero noticed Morales, she glanced down at a log to confirm whether Morales was an upper tier inmate and then heard a loud banging sound. When she looked up, she saw Rhoads falling towards her; Morales was standing near Rhoads in an aggressive fighting stance with his fists closed. Officer Davis, who was in a control booth above the podium, heard a loud knock from the podium area and saw Morales strike Rhoads in the temple with a clenched fist, knocking Rhoads to the ground. Officers sounded an alarm, requiring all prisoners to "go down," but Morales did not comply and began walking away, discarding some gloves he had been wearing. Officer Romero followed him and subdued him with pepper spray. Rhoads suffered "career-ending" injuries from the blow and fall. Morales denied attacking Rhoads.

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5. Respondent quotes the Statement of Facts from the California Court of Appeal's opinion. (Lodgment 6 at 2-3.) *See*, *e.g.*, *Dillard v. Roe*, 244 F.3d 758, 761 n.1 (9th Cir. 2001) ("The facts are taken from the opinion by the California Court of Appeal"); *DePetris v. Kuykendall*, 239 F.3d 1057, 1059-61 (9th Cir. 2001) (quoting the California Court of Appeal's "recitation of facts"); *see also* 28 U.S.C. § 2254(e)(1) (the state court's determination of the facts is presumed to be correct). A Statement of Facts with citations to the Reporter's Transcript (Lodgment 3) can be found at page 2 of the Respondent's Brief filed in case number D044560. (Lodgment 5.)

ARGUMENT I.

THE PETITION IS BARRED BY THE STATUTE OF LIMITATIONS PURSUANT TO 28 U.S.C. § 2244(d) AND THEREFORE SHOULD BE DISMISSED WITH PREJUDICE

Because the present Petition was filed after April 24, 1996, it is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Smith v. Robbins*, 528 U.S. 259, 268 n. 3, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). As amended by the AEDPA, 28 U.S.C. § 2244(d) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Under these provisions, Morales's present Petition is untimely, because the statute of limitations expired almost a year-and-a-half prior to the filing of the instant federal Petition.

Because Morales filed a petition for review in the California Supreme Court, his conviction became final 90 days after the California Supreme Court denied review. *See Bowen v Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999). Thus, his conviction was final on November 29, 2005, 90 days after the California Supreme Court denied his petition for review on August 31, 2005. (Lodgment 7.)

Normally, the statute of limitations begins to run on the day following finality, Fed. R. Civ. P. 6(a), unless one of three exceptions apply. 28 U.S.C. § 2244(d)(1)(B)-(D). None of the exceptions applies to Morales: there was no state impediment to his seeking further relief; his claims do not rely on any new constitutional right, and the factual predicate for his current claims was

known by the time his conviction was final.[6/] *See id.*

Accordingly, the statute of limitations began to run on November 30, 2005, and the limitations period expired one year later, on November 29, 2006, unless Morales is entitled to tolling. Fed. R. Civ. P. (6)(a); *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001). Morales did not mail his federal Petition until April 9, 2008, roughly a year-and-a-half after the expiration of the statute of limitations. As discussed below, he is not entitled to sufficient statutory or equitable tolling to render the Petition timely.

A. Morales Is Not Entitled To Statutory Tolling Sufficient To Render The Present Petition Timely

Morales cannot qualify for statutory tolling sufficient to render the present Petition timely. 28 U.S.C. § 2244(d)(2) provides tolling of the AEDPA's one-year-statute-of-limitations for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending[.]"

The statute of limitations in Morales's case began to run on November 30, 2005. Morales did not file his first state petition until October 17, 2006.[7/] A federal petitioner is not entitled to statutory tolling for the period between finality of the state court judgment and the filing of the petitioner's first collateral challenge in state court because there is no state action "pending" for purposes of 28 U.S.C. § 2244(d)(2).[8/] *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). Consequently, 322 days of the AEDPA's one-year-statute-of-limitations had elapsed when Morales filed his first state habeas petition.

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6. Although Morales may have been unaware of the legal significance of some facts, that does not affect the commencement of the statute of limitations, which "begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance." *Hasan v. Galaza*, 245 F.3d 1150, 1154 n.3 (9th Cir. 2001).

7. The Ninth Circuit has held that "the mailbox rule applies with equal force to the filing of state as well as federal petitions[.]" *Anthony v. Cambra*, 236 F.3d 568, 575 (9th Cir. 2000). Consequently, Respondent will refer to the dates on which Stockdale signed his petitions for purposes of the statute of limitations calculations.

8. The Superior Court, in its order denying the petition, expressly found the petition to be timely filed. (Lodgment 8 at 1.)

The statute of limitations was tolled from October 17, 2006, until the superior court denied the petition on December 15, 2006. 28 U.S.C. § 2244(d)(2). Morales next filed a petition in the California Court of Appeal, which he mailed on February 7, 2007. The Court of Appeal, in its order denying the petition, found the petition to be untimely, explaining,

> We conclude the petition is procedurally barred because it is untimely. (*In re Robbins* (1998) 18 Cal. 4th 770, 780.) Morales did not begin seeking habeas relief until more than a year after this court issued its decision on appeal and Morales has not established good cause for the delay.

(Lodgment 10 at 2.)

A state petition that is rejected as untimely under state law is not "properly filed" for purposes of tolling under 28 U.S.C. § 2244(d)(2). *Pace v. DiGuglielmo*, 544 U.S. 408, 414, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005) ("When a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)."). Consequently, Morales is not entitled to tolling based on the filing of his petition in the Court of Appeal. As only 43 days of the AEDPA limitations period remained when the superior court denied his first state petition on December 15, 2006, the Court of Appeal's determination that his February 7, 2007, petition was untimely is dispositive. *See id.* Consequently, the instant Petition must be dismissed as untimely unless Morales can demonstrate that he is entitled to equitable tolling.

B. Morales Is Not Entitled To Equitable Tolling Because He Fails To Establish Either Of The Elements Required Under *Pace*

Morales has also failed to demonstrate that he is entitled to equitable tolling. "[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. at 418. Morales did not commence the filing of his state petitions until 322 days of the 365-day limitations period had elapsed. He then did not file a federal petition until almost a year-and-a-half after the expiration of the statute of limitations and he offers no explanation as to his delay. Consequently, any claim of entitlement to equitable tolling fails under *Pace*.

Accordingly, as demonstrated above, Morales's Petition should be dismissed as it is barred under the statute of limitations. However, in the event this Court determines that the Petition is

timely, Respondent alternatively addresses the merits of Morales's claims below.

II.

THE STATE COURTS' REJECTION OF MORALES'S FIRST CLAIM OF PROSECUTORIAL MISCONDUCT WAS A REASONABLE APPLICATION OF CONTROLLING UNITED STATES SUPREME COURT AUTHORITY

In his first claim, Morales alleges that the prosecutor committed misconduct by eavesdropping on a conversation between Morales and his defense counsel. (Pet. at 6-9.) Morales presented this claim to the California Court of Appeal, which denied the claim in a reasoned decision. (Lodgment 9 at 3-6; Lodgment 10 at 2.) Morales then presented the identical claim to the California Supreme Court in a petition for writ of habeas corpus, which the California Supreme Court denied without citation or comment. (Lodgment 11 at 3-7; Lodgment 12.) Morales cannot demonstrate that the state courts' rejection of his claim was contrary to, or an unreasonable application of, controlling United States Supreme Court authority or the facts presented.

Federal habeas corpus lies only to correct violations of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254; *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). As the instant Petition was filed in 2007, it is therefore subject to the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Smith v. Robbins*, 528 U.S. at 268 n. 3. An application for a writ of habeas corpus by a state prisoner may not be granted based on a state court's determination of the merits of a claim unless the state court determination "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see also Carey v. Musladin*, 549 U.S. 70, ___, 127 S. Ct. 649, 652, 166 L. Ed. 2d 482 (2006).

A state court determination will be contrary to clearly established federal law,

> "if the state court applies a rule that contradicts the governing law set forth in our cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent."

Lockyer v. Andrade, 538 U.S. 63, 73, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003).

A state court determination will be an unreasonable application of clearly established federal law,

> if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." [Citation.] The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. [Citation.] The state court's application of clearly established law must be objectively unreasonable. [Citation.]

Id. at 75.

This "highly deferential standard" demands that federal courts give state court decisions "the benefit of the doubt." *Woodford. v. Visciotti*, 537 U.S. 19, 24, 123 S. Ct. 257, 154, L. Ed. 2d 279 (2002.) Thus, the AEDPA "significantly curtails the scope of collateral review," *Earnest v. Dorsey*, 87 F.3d 1123, 1127 n.1 (10th Cir. 1996), by creating a "new, highly deferential standard for evaluating state court rulings" on federal habeas corpus. *Lindh v. Murphy*, 521 U.S. 320, 334 n.7, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997).

Where the state supreme court has summarily denied a claim, a federal court conducting habeas corpus review must "look through" the summary denial and consider the "last reasoned" state court decision. *Medina v. Hornung*, 386 F.3d 872, 877 (9th Cir. 2004); *see also Ylst v. Nunnemaker*, 501 U.S. 797, 803-04, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). Here, since the California Supreme Court summarily denied Morales's petition for writ of habeas corpus in which he raised the claim (Lodgment 12), the last reasoned decision is the California Court of Appeal's order denying his habeas petition in that court. (Lodgment 10.)

The Court of Appeal rejected Morales's claim as follows:

> Regarding Morales's prosecutorial misconduct claim, he has not established that the prosecutor intentionally eavesdropped on any conversation between Morales and his trial counsel. Morales's declaration is not sufficient to meet his burden on this point. (See, e.g., *In re Alvernaz* (1992) 2 Cal.4th 924, 938.) Moreover, although Morales contends the prosecutor could not have learned that Morales used the document to refresh his recollection except by eavesdropping, Morales's recounting of the facts suggests otherwise. According to Morales, he and his trial counsel reviewed the document in the courtroom before trial was to reconvene. At the time, the prosecutor was sitting at the prosecutor's end of the table approximately four feet from them, exactly where one would expect the prosecutor to be. From this location, the prosecutor would have been able to easily observe Morales referring to the document. Under the circumstances, the prosecutor's observation is not misconduct.

(Lodgment 10 at 2.)

Although the state court did not cite applicable federal law in denying petitioner's claim, the state court's decision was nonetheless a reasonable application of the controlling United States Supreme Court authority. Indeed, even where a state-court decision fails to cite or acknowledge United States Supreme Court authority, a federal court may not grant habeas relief unless the state court's reasoning or result contradict clearly established United States Supreme Court precedent. *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002).

As the Ninth Circuit explained in *Williams v. Woodford*, 384 F.3d 567, 584-85 (9th Cir. 2004),

> When the government deliberately interferes with the confidential relationship between a criminal defendant and defense counsel, that interference violates the Sixth Amendment right to counsel if it substantially prejudices the criminal defendant. *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir.1985); *Weatherford v. Bursey*, 429 U.S. 545, 557-58, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). Substantial prejudice results from the introduction of evidence gained through the interference against the defendant at trial, from the prosecution's use of confidential information pertaining to defense plans and strategy, and from other actions designed to give the prosecution an unfair advantage at trial. *United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir.1980).

As the Court of Appeal noted, Morales's showing is deficient in a number of respects. First, even accepting Morales's self-serving declaration (Pet., Exh. A) at face value, he fails to demonstrate any deliberate act of interference by the prosecutor in the attorney-client relationship. Morales alleges that, prior to testifying, he reviewed a document with his attorney in the courtroom while the prosecutor sat four feet away at the prosecutor's end of the table. (Pet., Exh. A at 2.) On cross-examination, the prosecutor asked Morales if he had used any documents to refresh his recollection prior to testifying. (Lodgment 3 at 618.) Morales claims that this amounted to improper interference in the attorney-client relationship and could only have been the result of eavesdropping during his earlier courtroom discussion with his attorney.

California law requires that,

> if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party[.]

Cal. Evid. Code § 771(a).[9/]

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9. California Evidence Code section 771(a) is substantially similar to Federal Rule of Evidence 612.

Accordingly, there was nothing improper in the prosecutor's questioning of Morales on the subject. Moreover, Morales has cited no controlling United States Supreme Court authority that requires the prosecutor to absent himself from the courtroom while a defendant and his lawyer are conferring or otherwise avert his eyes while the defendant reviews a document. There is no indication in the record that the prosecutor spied on the conversation or was even aware of the contents of the document until it was produced pursuant to California Evidence Code section 771(a). No misconduct occurred and the state courts' rejection of his claim was reasonable under 28 U.S.C. § 2254(d).

III.

THE STATE COURTS' REJECTION OF MORALES'S SECOND AND THIRD CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS A REASONABLE APPLICATION OF CONTROLLING UNITED STATES SUPREME COURT AUTHORITY

In his second claim, Morales alleges that his defense attorney was constitutionally ineffective for failing to preserve the attorney client privilege by challenging the prosecution's use of the documents with which he refreshed his recollection prior to testifying. (Pet. at 10-11.) In his third claim, Morales alleges that his defense attorney was ineffective for failing to impeach the testimony of Officer Davis and failing to present evidence that another inmate Morales made threatening remarks to Rhoads. (Pet. at 12-16.) Morales presented these claims to the California Court of Appeal, which denied the claims in a reasoned decision. (Lodgment 9 at 8-15; Lodgment 10 at 2-3.) Morales then presented the identical claims to the California Supreme Court in a petition for writ of habeas corpus, which the California Supreme Court denied without citation or comment. (Lodgment 11 at 8-16; Lodgment 12.) Morales cannot demonstrate that the state courts' rejection of his claims was contrary to, or an unreasonable application of, controlling United States Supreme Court authority or the facts presented.

The federal constitutional standard for ineffective assistance of counsel requires a habeas petitioner to establish each of two prongs: (1) that counsel's performance fell below an objective standard of reasonableness, under prevailing norms of practice, and (2) that the defendant was prejudiced, in the sense that he would have received a more favorable result but for counsel's

unprofessional errors. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). California courts apply the *Strickland* standard when assessing claims of ineffective assistance of counsel. *People v. Ledesma*, 43 Cal. 3d 171, 215, 729 P. 2d 839, 233 Cal. Rptr. 404 (Cal. 1987).

In order to succeed on an ineffective assistance claim, a petitioner must make a sufficient factual showing to substantiate the claims. *United States. v. Schaflander*, 743 F.2d 714, 721 (9th Cir. 1984). Vague and speculative assertions of counsel's ineffectiveness are deficient. *United States v. Taylor*, 802 F.2d 1108, 1119 (9th Cir. 1986).

With respect to his claim that counsel failed to preserve the attorney client privilege by challenging the prosecution's use of the documents with which he refreshed his recollection prior to testifying (*see* Argument I, *ante*), the Court of Appeal explained,

> Regarding Morales's ineffective assistance of counsel claims, Morales has not established that counsel's performance was both deficient and prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *In re Thomas* (2006) 37 Cal.4th 1249, 1256.) As for trial counsel's failure to assert the attorney-client privilege, Morales has not established the document was protected by the privilege. Morales's declaration to this effect is not sufficient. (*In re Alvernaz*, *supra*, 2 Cal.4th at p. 938.) According to the record, the document was simply a narrative of Morales's version of events. [Lodgment 3 at 619-20.] Because Morales elected to testify, he did not intend his version of events to remain confidential. Therefore, the record suggests the documents was either not privileged or the privilege was waived. (Evid. Code, § 954 [privilege applies to information intended to be confidential and not disclosed to third persons]; Evid. Code, § 912 [privilege is waived if holder discloses a significant part of the communication].)
>
> Even if the document was privileged and the privilege was not waived, an attorney's failure to assert the attorney-client privilege may be excused if tactically necessary to protect a client's interests. (See *People v. Vargas* (1975) 53 Cal.App.3d 516, 528.) In this case, disclosure of the document appears to have been tactically necessary to protect Morales's interests. Had trial counsel asserted the privilege with respect to the document and refused to produce it, the trial court would have been obliged to strike Morales's testimony. (Evid. Code, § 771, subd. (a).) Then, the jury would have been prevented from considering Morales's version of events and Morales's entire defense would have been undermined.

(Lodgment 10 at 2-3.)

The state court's application of the California Evidence Code in determining that the document disclosed to the prosecution pursuant to California Evidence Code section 771(a) was either not privileged or that any privilege had been waived is not reviewable on federal habeas corpus. *See Estelle v. McGuire*, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

Consequently, counsel could not be ineffective for failing to assert the privilege because no privilege existed. *See James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994) ("Counsel's failure to make a futile motion does not constitute ineffective assistance of counsel.").

The California Court of Appeal similarly rejected Morales's remaining claims of ineffective assistance of counsel,

> As for Morales's remaining claims, Morales has not established that trial counsel's investigation, preparation, and trial performance were professionally unreasonable. (*In re Thomas, supra*[,] 37 Cal.4th at pp. 1257-1258.) The record shows trial counsel impeached Officer Davis to the extent possible given Officer Davis's responses to questioning. Similarly, there is no declaration from trial counsel or other evidence showing trial counsel did not investigate the possibility Inmate Gonzalez was the perpetrator. Trial counsel was undoubtedly aware of Inmate Gonzalez's threat toward the victim because prison officials believed Inmate Gonzalez was Morales's accomplice in the assault. Although Morales considers Inmate Gonzalez's threat to be exculpatory, a jury might have considered it inculpatory because Inmate Gonzalez made the threat in his capacity as the Mexican inmate representative and in response to the victim's decision to verbally counsel Morales. Therefore, trial counsel's decision not to introduce evidence of the threat appears to be a tactical choice entitled to deference. (*Ibid*.)

(Lodgment 10 at 3.)

Morales's claim in this Court suffers from the same lack of factual support identified by the state court regarding the possible tactical reasons for defense counsel's actions. Accordingly, the state courts reasonably applied *Strickland* in rejecting Morales's claims.

IV.

MORALES'S FOURTH CLAIM THAT THE SUPERIOR COURT AND COURT OF APPEAL FAILED TO COMPLY WITH CALIFORNIA RULE OF COURT 4.551(A)(3) FAILS TO PRESENT A FEDERAL QUESTION

In his fourth claim, Morales alleges that the superior court and the California Court of Appeal violated California Rule of Court 4.551(a)(3) by not ruling on his habeas petitions in the time prescribed by the rule. (Pet. at 17-18.) Morales fails to identify a federal constitutional violation based on the state's application of the California Rules of Court. The state courts' application of state law is not cognizable on federal habeas corpus and Morales's bare mention of due process cannot transform his state-law-claim into a federal one. *See Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996).

V.

THE STATE COURTS' REJECTION OF MORALES'S FIFTH CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS A REASONABLE APPLICATION OF CONTROLLING UNITED STATES SUPREME COURT AUTHORITY

In his fifth claim, Morales alleges that his appellate attorney was constitutionally ineffective for failing to raise his first and second claims on direct appeal. (Pet. at 19.) Morales presented this claim for the first time to the California Supreme Court in a petition for writ of habeas corpus, which the California Supreme Court denied without citation or comment. (Lodgment 11 at 16-17; Lodgment 12.) Morales cannot demonstrate that the state courts' rejection of his claim was contrary to, or an unreasonable application of, controlling United States Supreme Court authority or the facts presented.

Where, as here, the state court has summarily denied a claim, a federal court independently reviews the entire record and applies 28 U.S.C. § 2254(d) to determine "'whether the state court's resolution of the case constituted an unreasonable application of clearly established federal law.'" *Greene v. Lambert*, 288 F.3d 1081, 1089 (9th Cir. 2002); *see also Brown v. Ornoski*, 503 F.3d 1006, 1010-11 (9th Cir. 2007).

Claims of ineffective assistance of appellate counsel are reviewed under *Strickland*. *Bailey v. Newland*, 263 F.3d 1022, 1028 (9th Cir. 2001). Morales's claim fails under both prongs of *Strickland*. First, as discussed above, the claims are without merit and appellate counsel was not deficient for failing to present meritless claims to the appellate court. *See e.g. James v. Borg*, 24 F.3d at 27 (Counsel's failure to make a futile motion does not constitute ineffective assistance of counsel."); *see also Smith v. Robbins*, 528 U.S. at 278 ("[A]lthough . . . indigents generally have a right to counsel on a first appeal as of right, it is equally true that this right does not include the right to bring a frivolous appeal and, concomitantly, does not include the right to counsel for bringing a frivolous appeal.") Further, as Morales was able to present the claims to the California Supreme Court by way of a petition for writ of habeas corpus, he fails to establish how he was prejudiced by any failure of appellate counsel. Morales obtained judicial consideration of his claims in the state courts. His claims were simply found to be lacking in merit and presentation of the claims on direct

appeal, as opposed to habeas corpus, would not have altered that fact.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Habeas Corpus be dismissed with prejudice as untimely, or, in the alternative, denied with prejudice on the merits, and that no certificate of appealability issue from the denial.

Dated: September 5, 2008

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)